Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 1996

KATHERINE HINE,
Petitioner,

v

STATE OF OKLAHOMA EX REL.
OKLAHOMA BAR ASSOCIATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment's speech, expression, and petitioning clauses prohibit a state from disciplining a lawyer under a rule prohibiting "conduct that is prejudicial to the administration of justice" who joins as a private citizen in a good faith letter of concern to a trial judge about the inadequacy of protections being provided to an abused child whose custody is being litigated in a public bench trial, when the trial judge testified he was not prejudiced by the letter.

2. Whether a state may presume a potential for prejudice to a civil bench trial, so as to provide a sufficiently compelling governmental interest to justify the state in sanctioning core petitioning activities of drafting, circulating and presenting a good faith, fact-based letter to a court on issues of public concern, as to the lawyer signer only, without chilling constitutionally protected First Amendment rights and denying the sanctioned attorney, Fourteenth Amendment Equal Protection rights.

3. Whether the Due Process Clause of the Fourteenth Amendment is offended by a state Supreme Court decision retroactively punishing a lawyer for speech not expressly prohibited by the language of its rule proscribing conduct that "is prejudicial to the administration of justice" but which becomes sanctionable only by reason of the State Court's first impression extension of the rule to include speech allegedly creating a "reasonable likelihood" of material prejudice to a pending public civil bench trial.

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OPINIONS BELOW

The Supreme Court of Oklahoma has issued an opinion in this case, a copy of which appears in Appendix A to this Petition, at pages 1a-11a. The opinion has been reported at page 1462 of The Oklahoma Bar Journal, Vol. 68, No. 17, published 4/26/97. The Trial Panel Report of the Professional Responsibility Tribunal, the text of which appears in Appendix B to this Petition, lists various findings of the original trier and notes petitioner's having raised the Federal Constitutional issues.

STATEMENT OF JURISDICTIONAL BASIS

The judgment and opinion of the Supreme Court of Oklahoma was entered on April 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

This case involves Oklahoma's Rule of Professional Conduct 8.4(d) and 3.6(d)(6), 5 Ok. Statues 1991, Ch. 1 App. 3-A, and the First and Fourteenth Amendments to the United States Constitution, all of which are reproduced at Appendix G.

STATEMENT OF THE CASE

Petitioner Hine, an Oklahoma attorney who frequently tries cases involving child abuse, and who was also a citizen member of the child advocacy group SCAN (Stop Child Abuse Now), signed and sent a letter [App. C] to an Oklahoma trial judge during the pendency of a child custody proceeding. [App A, p.2a] The letter was on SCAN letterhead, signed by Hine and eight other SCAN members, and although one of the telephone numbers listed on the letterhead was Hine's, there was no designation in the letter or on the letterhead that Hine was an attorney. [App A, pp. 2a-3a] Neither Hine nor any of the signatories to the letter were individuals previously known to the trial judge. [App. E pp.1e-3e]

Prior to the sending of the letter, the grandmother and father of one of the allegedly abused children referred to in the letter, had contacted SCAN and over a period of time, they and their attorney had informed petitioner that one county agency had improperly interviewed the child and another agency had disregarded the trial judge's supervised visitation order. No attorney-client relationship was ever established or alleged to have been established between the petitioner and any individual involved in the custody proceeding concerning the child. [App A, p 2a.] The proceeding was open to the public and there is no evidence in the record below that a gag order had ever been imposed.

The evidence was unrefuted that the trial judge and the respective attorneys for both parents received copies of the letter on the morning of September 22, 1995. [App A, p. 11a ftnt.22] There were no other attorneys in the case, as the child had no attorney, court appointed special advocate, or guardian *ad litem*. [App E, p. 7e]

Respondent Bar Association filed a formal Complaint against Hine on February 26, 1996, alleging, among other things

that Hine engaged in "conduct that is prejudicial to the administration of justice", to which she filed a March 21, 1996 Response setting forth affirmative defenses under the First and Fourteenth Amendments. [App D]

Testimony was taken before a Professional Responsibility Tribunal on June 19, 1996 and the Trial Panel made findings that the trial judge "was not prejudiced by the SCAN letter" and that Hine "had a good faith belief in the truth of the statements contained in the SCAN letter". [App B, p. 3b] Neither finding was refuted by the Oklahoma Supreme Court in its *de novo* review of the Trial Panel Report.

The federal constitutional issues Hine raised in her Response were developed during testimony and argued at the close of such testimony [App E] but were held by the Trial Panel to be beyond its purview. [App B]

The First and Fourteenth Amendment issues Hine raises now and had raised previously before the Trial Panel [App. E] were also raised in her Brief to the Supreme Court of Oklahoma. [App F] Hine produced unrefuted evidence at trial that judges are under virulent public attack due to perceived insensitivities or to perceived inadequacies in training, particularly in child abuse cases. Hine also testified that she was concerned about such public attacks and hoped that SCAN's ability to provide current literature and other information about child abuse and the functioning or lack of functioning of the child protection system would defuse some of the attacks. [App. E, pp. 12e-13e] Testimony from a child advocate about attorney fear of bar discipline chilling attorney participation in law reform child advocacy organizations to the detriment of such organizations and of children, [App E, p. 9e] was unrefuted.

Hine's Brief to the Oklahoma Supreme Court advanced the following basic arguments: (1) that Rule 8.4(d) is impermissibly vague as applied to the SCAN letter, especially in light of

Oklahoma RPC # 3.6(d)(6) and other legal authorities, including child abuse reporting legislation, which appear to specifically permit an attorney to disseminate the kind of information contained in the SCAN letter, causing Hine to reasonably believe her conduct fell within Rule 3.6's "Safe Harbor" and other provisions of law; (2) that she could not have violated Rule 8.4(d) because the express language of the Rule requires conduct that "is prejudicial to the interests of justice" [emphasis supplied] and it is unrefuted that no actual prejudice resulted; (3) that even had there been an ongoing criminal jury trial, Rule 8.4(d) could not have been applied to Hine's speech consistently with then existing interpretations of the First Amendment, unless the letter was proven to have posed at least a "substantial likelihood of material prejudice", if not a "clear and present danger"; and (4) that to apply Rule 8.4(d) using a standard any broader than the "substantial likelihood" or the "clear and present danger" standards to petitioner's letter would subject all manner of protected speech to disciplinary sanction. [App. F]

The Supreme Court of Oklahoma opinion below stated that the court "has not previously circumscribed the reach of Rule 8.4(d)". The opinion extended the coverage of Rule 8.4(d) to conduct that posed a "reasonable likelihood of material prejudice" to the administration of justice, noted the absence of any prejudice to the underlying custody trial, and declined to make any constitutional analysis on the theory that Hine's right to disseminate the information contained in the letter to the news media was irrelevant to whether she had the right to disseminate the information to the trial judge. The Oklahoma court then imposed a public reprimand. [App. A]

REASONS FOR GRANTING WRIT

I. CERTIORARI IS NECESSARY TO SETTLE CONFLICTS AMONG DECISIONS OF OTHER STATE COURTS OF LAST RESORT

A. *This Court's Ruling is Needed to Resolve Widely Divergent Opinions Concerning the Type of Notice Mandated by the First and Fourteenth Amendments when State Courts Interpret Lawyer Disciplinary Rules Regulating Speech*

This is a case involving speech by an attorney purely in her capacity as a private citizen [App A, p. 5a, App. C], critical of certain government agencies, but not the judiciary, speech admittedly for "altruistic motives" [App A. p. 8a] that had caused no prejudice to the ongoing child custody court trial. [App A, ftnt. 22] The speech in question consisted exclusively of the core First Amendment activities of drafting, circulating, and presenting a letter [App. C] seeking redress of grievances on behalf of those members of the public concerned about the safety of children. No other conduct, e.g. press conferences or picketing, was involved. The Oklahoma Supreme Court's complete avoidance of all federal constitutional issues in a State disciplinary proceeding seeking to sanction an attorney citizen purportedly for speech "that is prejudicial to the administration of justice", and extending the coverage of the rule beyond its literal meaning to speech posing a "reasonable likelihood of material prejudice" [App A p.6a & 7a], conflicts sharply with the constitutional standards adopted and applied by the Supreme Court of New Jersey to identical language. *In Re Hinds* 449 A2d 483 (N.J. 1982).

The New Jersey proceeding differed from the Oklahoma proceeding in that the former involved media speech addressing an ongoing criminal jury trial, the content of the speech was clearly insulting to the court, and it was uttered by a lawyer who was

arguably a trial participant. The New Jersey Court noted that the "conduct that is prejudicial" rule is rarely, if ever, used alone[1] and is limited to "situations involving conduct flagrantly violative of accepted professional norms." [*Hinds* at p. 498].[2] The *Hinds* court further noted that the language of the rule "gives the appearance of an aspirational standard, rather than a disciplinary rule" [p. 497] and that, while not necessarily unconstitutional, the rule was "redundant" and would likely be abolished under the Model Rules. [p. 498, ftnt. 8] One of the few sources of interpretive guidance to understanding the meaning of Oklahoma's Rule 8.4(d) is in its official comments, which attempt to explain Rule 8.4(d) conduct as being criminal or at least of questionable moral turpitude.[3]

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[1] A search of Oklahoma decisions reveals no other reported decision in which lawyer discipline has been imposed based on violation of Rule 8.4(d) without the existence of a criminal infraction or the violation of a disciplinary rule other than 8.4(d). A state's failure to establish any other violation creates an obvious notice problem because of 8.4(d)'s broad and general terms.

[2] Clearly abusive language that is a mere sham [*Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S.127(1961)] or knowingly false speech [*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)] can be of such a nature as to receive diminished or non-existent First Amendment protections.

[3] The official comment to Rule 8.4(d) reads in pertinent part as follows:

> "Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving 'moral turpitude.' That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, *a lawyer should be professionally*

In *Matter of Keller*, 693 P2d 1211 (Mont. 1984) the Supreme Court of Montana, while acknowledging that First Amendment attorney speech rights can be limited if in direct conflict with Sixth Amendment rights to a fair trial in a criminal case, held that *all* of its disciplinary rules restricting attorney speech were violative of the First Amendment because none gave advance notice of any "clear standard by which attorneys can gauge their conduct". [*Keller*, p. 1214] The *Hinds* court likewise declined to apply the New Jersey equivalent of Rule 8.4(d) retroactively where the Court's opinion itself constituted "the first opportunity we have had to define the proper scope of" the rule. [*Hinds*, p.500] The Supreme Court of Oklahoma opinion below also conceded its failure to have "previously circumscribed the reach of Rule 8.4(d)" [App. A. p. 5a] but offered no explanation for the fact that such failure provided Oklahoma attorneys such as petitioner, with no prior notice of what speech or *whose* speech the rule prohibited.

Petitioner had no advance notice that she had lost the right to petition government in the same manner as other citizens, or that her conduct might be gauged under a "reasonable likelihood" standard. Compounding the notice and retroactive application

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answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon good faith belief that no valid obligation exists. The provisions of Rule 1.2(c) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law." [Emphasis supplied]

problems, the Oklahoma opinion also introduced novel and unspecified standards of conduct purportedly contained in the Eugene R. Gaetke article, *Lawyers as Officers of the Court*, 42 Vand. L. Rev. 39, 51-56, referenced in Ftnt. 20 of its opinion.[4]

B. This Court's Guidance is Needed to Clarify the Extent to which State Courts May Consider the Identity or Role of the Speaker in Assessing whether the First and Fourteenth Amendments Permit Sanctioning Speech for the Stated Purpose of Preserving Fair Trial Rights.

The *Hinds* court reasoned that since the "conduct that is prejudicial" rule applies "when the attorney is not particularly or specially connected with" the pending proceeding, [p.498], such an attorney "would seemingly enjoy the same free speech rights as any other citizen" [pp. 498-499]. The Oklahoma Supreme Court just nine years earlier had appeared very sensitive to the obvious equal protection problems inherent in sanctioning attorneys when other citizens may not be, and voiced its concern

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[4] Ironically, at p. 52 of the article, included in a listing of desired affirmative ethical considerations for lawyers seeking to fulfill their obligations as officers of the court is a suggested requirement that

> "[a] lawyer must disclose any information indicating that a person other than a client has perpetrated a fraud upon a tribunal."

Clearly the fact that the Oklahoma trial judge's order of supervised visitation was being interpreted to mean that the court ordered supervisor could leave the room during the visitation, in light of the unrefuted expert testimony that the child had been damaged by the lack of supervision [App. E, pp. 12e-13e], was a matter that petitioner had every reason to believe was a fraud upon the tribunal about which the trial court should have been advised. Advising the trial Court specifically about such fraud was core petitioning activity protected by the First Amendment. The trial judge also admitted in his testimony that this was the sort of information that was important for him to have. [App E, p. 6e].

about the Oklahoma Bar Association's attempts at that time to prohibit

> "a certain class of citizens, attorneys, from speaking on certain subjects, criticism of the judiciary. This concern with limiting what subjects may be spoken to by which speakers is absolutely inimical to the principles of the First Amendment. In the realm of protected speech, *the government is constitutionally disqualified from dictating* the subject about *which persons may speak* and the speakers who may address a public issue." [Emphasis supplied][citations omitted] *State ex rel. Okl. Bar Assn. v. Porter*, 766 P2d 958,967 (1988)

The only possibility of prejudice ever mentioned by the Oklahoma court below arose out of its speculation about the alleged forseeability of Judge Lee recusing. There was no proof whatever that the fact that petitioner was one of the signers made the letter prejudicial in any different manner than it would have been with only the other eight names. In order to sanction petitioner exclusively, it was the State's burden to establish not only the existence of a compelling state interest requiring Hine's speech and petitioning in this instance to be treated differently than that of other citizen signers, but that the Rule 8.4(d) sanction was "no greater than is necessary or essential to the protection of the particular governmental interest involved". *Procunier v. Martinez*, 416 U.S. 396, 413 (1974).

The *Hinds* court further held that in order not to violate significant First Amendment rights, the standard that should be invoked in applying an 8.4(d) type disciplinary rule to the speech of a non-advocate attorney should be that of "clear and present danger" or "serious and imminent threat". [*Hinds*, p. 499] *See also*

In Re Rachmiel, 449 A2d 505 (N.J. 1982) (reasonable likelihood standard overly broad for First Amendment purposes as applied to an 8.4(d) type disciplinary rule). The Oklahoma Supreme Court below made no attempt at constitutional analysis and thus failed to make any differentiation between the varying potentials of prejudice to criminal versus civil, or to jury versus non-jury trials. The Oklahoma court offered no justification for not only extending the rule beyond its plain language but also then applying it *retroactively* to the petitioner.

The Supreme Court of Oklahoma's refusal to recognize the existence of legitimate First Amendment issues appears to rest in part on its misconception that attorney speech not reaching the media is constitutionally unprotected. [App. A, p. 6a] Not only is the speech of citizens consisting of core petitioning activity entitled to First Amendment protection, it is entitled to no less First Amendment protection than are the more general forms of expression of speech and press. *Cate v. Oldham*, 450 So2d 224 (Fla. 1984). [5]

C. The Widely Divergent State Standards Employed in Assessing the Impact of Good Faith Political or Petitioning Speech upon Pending Litigation, Raises Serious First Amendment Issues.

State as well as federal courts, in assessing attorney speech as prejudicial to fair trial rights, use at least four different standards, i.e. the clear and present danger test, the serious and

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[5] *See also McDonald v. Smith*, 472 U.S. 479 (1985); *Western Nat'l Mut. Ins. Co. v. Lennes* (In re Workers' Compensation Refund) 46 F3d 813 (8th Cir.1995); *Re IBP Confidential Business Documents Litigation*, 800 F2d 787 (8th Cir. 1986).

imminent threat test, the substantial likelihood of prejudice test, and the reasonable likelihood of prejudice test.[6]

The Supreme Court of West Virginia, in reviewing discipline of attorney speech publicly insulting to the judiciary, but not clearly false, concluded that

> "the Free Speech Clause of the First Amendment protects a lawyer's criticism of the legal system and its judges, . . . a lawyer's speech that presents a *serious and imminent threat* to the fairness and integrity of the judicial system is not protected. It is apparent that when a personal attack is made upon a judge or other court official, such speech is not protected if it consists of knowingly false statements or false statements made with a reckless disregard of the truth. . . . and that statements that are outside of any community concern, and are merely designed to ridicule or exhibit contumacy toward the legal system may not enjoy First Amendment protection." *Committee on Legal Ethics v.Douglas*, 370 SE2d 325, 326-327 (W. Va. 1988)[7]

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[6] The potential chilling effect on attorney speech is exacerbated by the increasing mobility of lawyers who may practice in several jurisdictions, each with different standards.

[7] Out of a probable concern that the First Amendment may require it, at least six states already espouse some version of the clear and present danger test as applicable to public attorney speech alleged in disciplinary proceedings to threaten the administration of justice. *See* Berkowitz-Caballero, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*; 68 N.Y.U.L. Rev. 494, 543 Ftnts. 282 & 283 (1994)

[Emphasis supplied]

The decision of the Supreme Court of Oklahoma hereinbelow is not only in conflict with decisions interpreting or applying the First Amendment in the highest courts of other states, it is also in conflict at least with the spirit and implications of its own earlier decisions in this area. In *Williams v. Sullivan*, 350 Ok. 745, 131 P 703, 707 (1915), the Oklahoma court in commenting about an attorney's petitioning of a judge, assured Oklahoma attorneys that

> "[a]n attorney has the right to criticize the courts of this State, so long as his criticisms are made in good faith and in respectful language and with no design to willfully or maliciously misrepresent the position of the courts, or bring them into disrepute or lessen the respect due them."

In *State ex rel. Oklaholma Bar Ass'n. v. Porter,* 766 P2d 958 (Ok. 1988), upon which petitioner herein clearly relied, [App F, p. 1f] the theme of *Williams v. Sullivan* is reiterated and applied to a lawyer who publicly referred to a federal judge as a racist. The *Porter* Court found it significant that the trial panel had found, as it did hereinbelow, that

> "respondent established by unrefuted evidence that he had *subjectively* formed an opinion based upon experiences which he perceived as providing him with a rational basis for having concluded that the remarks he made had a factual basis." [*Porter* at p. 969][Emphasis supplied]

The *Porter* court then concluded that

> "[i]n the absence of a showing of falsity the

> statement must be held to be speech on vital issues of self government protected by the First Amendment. We thus hold that D.R. 1-102(A)(5)(6) [now 8.4(d)] cannot be construed to sanction the expressive activities before the Court." [*Porter* at p. 969]

Although there was no specific finding of good faith or altruism in *Porter*[8], as there was hereinbelow, [App A, p. 8a] the *Porter* court spoke of the need of the State to show "a subordinating interest which is compelling" [*Porter* at p. 967]. The *Porter* court at no point rendered any kind of analysis or caveat in any way suggesting that lawyer speech that is political and has a factual basis, as were both Porter's and petitioner's, should be assessed according to the broader standard of "reasonable likelihood of prejudice" to the administration of justice.[9]

D. This Court's Affirmation that the First Amendment Continues to Protect Pure Petitioning Activity of All Citizens is a Matter of Compelling Public Importance

In another state supreme court decision based on facts similar to those in the case at bar, [*In re Richmond*, 591 P2d 728 (Ore. 1979)], a lawyer spokesperson for an environmental organization sent a letter pertaining to the merits of a pending

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[8] Porter's speech was said to have been based merely on the speaker's *subjective* but rational opinion that the remarks he made about the Judge's alleged racism had a factual basis, and in a concurring opinion, Justice Opala stated that no discipline could have been constitutionally permissible even had the Bar proved that "respondent's remarks were *false in fact*". *Porter*, p. 970. [Emphasis supplied]

[9] The *Porter* court had the advantage of interpreting the more specific Ok. R.P.C. #3.6(a), which expressly prohibits public lawyer speech that would "have a *substantial likelihood* of materially prejudicing an adjudicative proceeding" [emphasis supplied]. Rule 8.4(d) type disciplinary rules contain no such interpretive guidelines.

administrative proceeding, to the Oregon governor, to members of news media, and others, with the acknowledged hope that it would influence the result in the administrative proceeding. [*Richmond*, p. 729] The Oregon high court noted that much of the lawyer's activity constituted classic petitioning of government for redress of grievances, citing this Court's opinion in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). [*Richmond*, p. 730] The court noted that, notwithstanding the fact that Richmond was a trial participant whose petitioning speech was mixed with other traditionally less protected forms of expression,

> "it is clear that lawyers do not forfeit the right to speak or write freely or to petition the government just because they are 'officers of the courts'. . . . Litigation has long been recognized as one form of associational activity or 'petition.'" [*Richmond* at p. 730]

Although the conduct in *Richmond* included both petitioning and public speech issues, the court drew no distinction between First Amendment protections affordable to one form of expression but not to the other. In discussing potential restrictions on petitioning, the court did speak to the possible effect of petitions on proceedings that involved policy decisions and those that involved fact-finding, and remarked that certain factual statements were forms of expression necessary to place the public concerns of Richmond's client in proper context. [*Richmond* at p. 732] Certainly the letter of the petitioner herein does no more than place the political statements in the context of the underlying Perry vs. Perry litigation hereinbelow.

Unlike the Oklahoma court, the *Richmond* court declined to speculate about the possibilities of the factfinder's being required to recuse, and noted this Court's long-standing observation that "professional judges do not require the insulation

from extra-judicial criticism or public debate of a case that jurors do."[10] Petitioner submits that if judicial susceptibility to prejudice is as fragile as the Oklahoma Supreme Court decision below suggests, then it may become necessary to begin sanctioning all the lawyers on television commenting on ongoing high-profile cases in litigation, and not only sequester all judges involved in such cases, but make special provisions for the inspecting (and censoring) of incoming judicial mail.

II. CERTIORARI IS NECESSARY TO CREATE CONSISTENCY IN CONSTITUTIONAL INTERPRETATION OF ETHICAL STANDARDS, WHERE THERE IS NOW CONFLICT WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS.

A. This Court's Setting of Uniform Standards for assessing Prejudice to the Right of Fair Trial is a Matter of Compelling Public Concern.

The Oklahoma Supreme Court's usage for the first time of the reasonable likelihood standard, conflicts in the manner of application of the First Amendment, with a decision of the Fourth Circuit Court of Appeals. *Hirschkop v. Snead*, 594 F2d 356 (4th Cir. 1979) . *Hirschkop* remains one of the few decisions that has analyzed the competing free speech/ fair trial issues by breaking down the type of attorney conduct and type of proceedings potentially prejudiced, into manageable categories. The language of many of the attorney speech rules in *Hirschkop* was far more specific than is the general language of Oklahoma's Rule 8.4(d), and yet the Fourth Circuit held that constitutional principles prohibited most of the *Hirschkop* disciplinary rules from restricting

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[10] *In re Richmond*, 591 P2d 728, 731 (Ore. 1979)(ftnt.1), citing *Craig v. Harney*, 331 U.S. 367(1947) and *Pennekamp v. Florida*, 328 U .S. 331 (1946)

lawyer speech except for certain specific statements to media by lawyers representing litigants.

Hirschkop's Rule 7-107(G)(5), however, prohibiting statements made by attorneys representing civil litigants, about "any other matter reasonably likely to interfere with the fair trial of the action" (*Hirschkop*, p. 375) was held to be not only overly broad, but also void for vagueness.(*Hirschkop*, p. 373). Noting that *the American Bar Association committee and the Judicial Conference of the United States had made no recommendations at that time to restrict lawyer speech in any manner during civil trials*, the Fourth Circuit majority found that the integrity of the trial process in civil trials required no limitation at all on speech, not even a narrow one applying a clear and present danger standard. [*Hirschkop*, p. 373] Also, because restrictions on speech during pending civil cases would be likely to "prohibit comment over a period of several years" [*Hirschkop*, p. 373] and the court was unaware of any civil actions that had ever been prejudiced by pre-trial publicity[11], the *Hirschkop* court found it unacceptable to tell civil lawyers, *even those who were trial participants*, to delay comment until the conclusion of the case, citing this Court's protection of the timeliness and content of First Amendment speech in *Bridges v. California,* 314 U.S. 252, 268 (1941). Of course, in a child custody case, the delay in comment could commonly exceed a decade.

The *Hirschkop* Fourth Circuit focused specifically on the vastly decreased legitimacy of concerns for prejudice to the trial process in bench trials, noting that

> "[j]udges necessarily must consider evidence that has no direct bearing on the guilt or innocence

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[11] The *Hirschkop* court observed that another Court of Appeals had reversed the imposition of a gag order on lawyers during a civil trial due to First Amendment infringements in *CBS, Inc. v. Young*, 522 F2d 234 (6th Cir. 1975)

> of the accused. They must determine whether to suppress confessions and other evidence. When this evidence is excluded, they must nevertheless adjudge the accused to be guilty or innocent without considering the evidence which they have heard and held to be inadmissible. This record does not disclose what comments a lawyer could make about a pending case that would be more prejudicial than the information a judge must consider as he separates the wheat from the chaff during the course of an ordinary bench trial." (P. 371)

The record hereinbelow fails to reveal which, if any, statement in the SCAN letter was prejudicial, either in theory or in actuality.

The Seventh Circuit Court of Appeals has historically held that the First Amendment demands that a State make "sufficient specific findings . . . establishing that [attorney] conduct is a *serious and imminent threat* to the administration of justice" [emphasis supplied] before discipline for such conduct may validly be imposed in a manner consistent with federal constitutional principles. *In re Oliver,* 452 F2d 111, 114 (7th Cir. 1971). The Oklahoma Supreme Court made *no* specific finding of prejudice to *any* proceeding, choosing instead to speculate that petitioner's speech *might* have caused a judge to recuse or might have interfered with one of the participant attorneys' strategy of concealing certain facts from the judge. [App. A, ftnt 23] The Oklahoma Bar Association offered no reasons to suggest that petitioner's letter had a greater potential to prejudice the judge than would much of the material on child sexual abuse that daily appears on television and in the newspapers.

The *Oliver* court reinforced its protections of free speech and the right to meaningful notice, in *Chicago Council of Lawyers v. Bauer,* 522 F2d 242 (7th Cir. 1975) where the Seventh Circuit expressly rejected the "reasonable likelihood" standard as

overbroad, *regardless of the type of proceeding potentially affected*. *Bauer's* insistence on the serious and imminent threat standard was stated to "always be an element of any prohibition" [*Bauer*, p. 251] on lawyer speech of any type. The *Bauer* Court's holding regarding overbreadth and vagueness included concerns that some of the more general rules restricting lawyer speech could improperly be extended to attorneys "other than those involved on behalf of the Government" [*Bauer*, p. 253] The *Bauer* Court clearly intended to protect the First Amendment rights not only of attorneys not intimately involved in a criminal prosecution, but of any attorneys who might otherwise be prevented "from informing the public about the government's manner of performing certain tasks" , such as "that unsafe flight procedures were in effect and were being condoned by government regulatory agencies" [*Bauer*, p. 258]. The Oklahoma Supreme Court decision below, by ignoring the First Amendment and labeling the petitioner as unethical for bringing the issue of probable harm to a child to the attention of a judge charged with protecting him,[12] created a novel precedent that is irreconcilably in conflict with decisions from the Fourth and Seventh Circuits.

B. American Citizens, Including Lawyers, Need Clear Federal Constitutional Guidelines so that they Can Avoid Speech that May Prejudice a Pending Trial

The Oklahoma decision below conflicted with a decision of the Seventh Circuit addressing First Amendment rights of those who petition government. In *Marshall v. Allen*, 984 F2d 787 (7th Cir. 1993) an attorney public employee was held to have established public employer violations of his rights of free expression where the employee's speech, as hereinbelow, addressed a matter of great public concern and it was the

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[12] The trial judge testified and agreed that problems with the implementation of the supervised visitation order were matters of which he should be informed [App. E, p. 6e] and that he was statutorily mandated to protect the Perry child.[App.E, p. 7e]

protected speech that had clearly caused the governmental sanctions. *See also White Plains Towing Corp. v. Patterson*, 991 F2d 1049 (2nd Cir. 1993); *Eaton v. Newport Bd. Of Ed.*, 975 F2d 292, 299 (6th Cir. 1992).[13]

The Ninth Circuit Court of Appeals was called upon to apply a local Rule of Practice for a United States District Court prohibiting

> "conduct which degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice therein." [Rule 2.5.2, Local Civil Rules of Practice of the United States District Court, Central District of California]

to a lawyer's sexist diatribe directed against women attorneys. *U.S. v. Wunsch*, 54 F3d 579 (9th Cir. 1995). In a unanimous decision, the Court of Appeals found that the record contained no showing of adverse effect on the administration of justice, "either in this or in any other case", and stated, as it cited this Court's decision in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), that such lawyer speech could not, consistently with the First Amendment, be sanctioned without "facts showing a 'substantial likelihood of material prejudice'". [*Wunsch*, p. 585]

The Ninth Circuit again reversed sanctions imposed upon attorney speech under California's Rule 2.5.2 in *Standing Committee v. Yagman*. 55 F3d 1430 (9th Cir. 1995) even where the speech consisted of numerous vicious accusations of anti-

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[13] In *Eaton,* the Sixth Circuit held that the actions of citizens and employees, including petitioning, though part of a campaign to influence the *judicial* function of the school board, were not subject to sanctions because the First Amendment prohibits efforts to ensure 'laboratory conditions' during school board's decision making, "in the absence of clearly defined laws proscribing the conduct", citing this Court's decision in *Cox v. Louisiana*, 379 U .S. 559 (1965).

Semitism and drunkenness on the bench, hurled at a Judge in an apparent attempt to obtain his recusal. The Ninth Circuit specifically held that where the extra-judicial attorney speech is not based on the kind of special access to information that would be privy to a lawyer for a litigant in a pending case, even the *Gentile* substantial likelihood of material prejudice standard was too broad to protect First Amendment rights. [*Yagman*, p. 1442] The *Yagman* Court, reasoning that since the speech of lawyers not representing litigants is not perceived as particularly authoritative, as the Oklahoma trial judge admitted the petitioner's was not in his estimation [App. E, p. 1e], the State was required to show a "clear and present danger" to the administration of justice before it would be permitted to impose sanctions for such speech. The Ninth Circuit decisions are patently in conflict with the Oklahoma decision below.

The Fifth Circuit rendered a decision granting declaratory relief against a State Commission for reprimanding a Texas judge for statements critical of the judicial system contained in a letter to a newspaper. Against the State's contentions that the reprimand was necessary to "preserve the impartiality of the judicial branch", the Fifth Circuit reversed the District Court's grant of summary judgment to the State Commission, holding that the First Amendment protected such speech. *Scott v. Flowers*, 910 F2d 201, 212 (5th Cir. 1990). The Fifth Circuit opinion acknowledged that normally speech by citizens critical of the legal system is absolutely protected by the First Amendment absent a showing of clear and present danger. In the context of criticisms of government having nothing to do with his own conditions of employment, Judge Scott was found to have been "likely to have well-informed opinions" [*Scott*, p. 211] which should not have been silenced without an explanation of

> "precisely how Scott's public criticisms would impede the goals of promoting an efficient and impartial judiciary, and we are unpersuaded that they would have such a detrimental effect. Instead, we believe

> that those interests are ill served by casting a cloak of secrecy around the operations of the courts, and that by bringing to light an alleged unfairness in the judicial system, Scott in fact furthered the very goals that the Commission wishes to promote." [*Scott*, p. 213]

The same may as easily be said about the factual information provided to the Oklahoma trial judge, none of which was ever alleged by the State to be inadmissible. Such information as the SCAN letter offered, Judge Lee was free to ignore, or allow the parties to the litigation to fully litigate. The SCAN letter's references to the child's mother as an 'alleged perpetrator" are not, as the Oklahoma Court conjectures, "unsubstantiated assertions" made to persuade the judge of her unfitness for custody [App. A, ftnt 21], but rather, unquestionably accurate assessments that serious allegations had in fact been made, a fact that everyone participating in the case already knew. The obvious point of referencing the existence of abuse allegations was to give a context to the SCAN citizens' concerns about the competence of county agencies' child welfare investigations as well as another agency's lack of compliance with a court order designed to protect the Perry child. The overriding goals of the letter appear to have been not to influence the outcome of the litigation in a particular direction but to assist the Court in being aware of factors existing in his county that, if addressed[14], would strengthen the integrity of child welfare investigations and encourage rigorous implementation of judges' supervision orders. It would seem that making the information about the county agencies available to the trial judge could assist him in focusing the sanitizing light of judicial inquiry upon child abuse investigative

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[14] Addressing the fitness of public officeholders is specifically mentioned in the Official Comment to Oklahoma's RPC 8. 2 which states in part, that "[a]ssessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices. . . Expressing honest and candid opinions on such matters contributes to *improving the administration of justice*."

and supervised visitation processes, whose integrity is necessary not only in the interests of an abused child, but also to protect a falsely accused parent.

In summary, petitioner submits that an equally or more persuasive argument can be made that the "interjection" of the small amount of factual information contained in the SCAN letter helped to preserve the integrity and justice of the underlying litigation, than can be made that such information tainted or prejudiced it.[15] This Court's grant of certiorari would offer needed constitutional guidelines enabling the federal and state courts to perceive and tolerate the expression of diverse concepts of justice.

III. THIS COURT'S GRANT OF CERTIORARI IS NECESSARY TO RESOLVE CONFLICTS CREATED BY THE OKLAHOMA SUPREME COURT DECISION WITH DECISIONS OF THE UNITED STATES SUPREME COURT

A. It is a Matter of Great Public Importance that this Court Reaffirm that Where Free Speech is Threatened, Federal Constitutional Principles Take Priority Over State Disciplinary Regulations

Although petitioner raised her First and Fourteenth Amendment arguments early, often, and in detail,[App D, E, & F] and even though the Trial Panel specifically withheld making any conclusions of law because the "constitutional issues argued in this case are beyond the purview of the Trial Panel", [Appendix B]

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[15] The Oklahoma opinion below suggested that petitioner should be faulted for not having conducted an "independent investigation of the facts" [App. A, 2a]. The record below, however, reveals that such an investigation, requiring interviewing of attorney Wallace, his client, and/or the government workers, was clearly not an option available to petitioner due to confidentiality or ethical restrictions far more obvious than are the parameters of Rule 8.4(d).

the Supreme Court of Oklahoma excluded any express reference to the United States Constitution in its opinion, other than in Footnote 9 where it is noted that petitioner had raised the First Amendment issues. The Oklahoma opinion suggested that the principles set forth in its earlier decision in *State of Oklahoma ex rel. Okla. Bar Ass'n. v. Porter*, 766 P2d 958 (Ok. 1988) and in this Court's decision of *Gentile v. State Board of Nevada*, 501 U.S. 1030 (1991) might have been considered, had petitioner's letter been broadcast in the media, and then completely failed to recognize that the core petitioning act of sending the SCAN letter was entitled to the same First Amendment protections as is public speech in the media. *McDonald v. Smith*, 472 U.S. 479 (1985). *See also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Eastern R.R. Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). Oklahoma's decision below, by excluding any consideration of the First Amendment, using the pretext that petitioner's obviously respectful participation in expressive self-government constituted an affront to the dignity of the court, is still a decision on an important question of federal constitutional law, and one that runs *contra* to this Court's decision in *Bridges v. California* 314 U.S. 252 (1941) where the dignity of the Court was determined to be sufficiently resilient that it could withstand a labor leader's telegram to the Secretary of Labor calling a judge's decision outrageous and predicting serious consequences to efforts to enforce the order. This Court in *Bridges* further held that for government to restrict speech or petitioning, both of which were present in *Bridges*, in furtherance of its stated goal of punishing conduct deemed prejudicial to the administration of justice,

> "the substantive evil must be extremely serious and the degree of imminence extremely high" [*Bridges*, p. 263].

In criticizing the government's attempt to justify a restriction based on speech occurring during the pendency of a trial, the *Bridges* Court severely disapproved such attempts at restriction

> "at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the the most important topics of discussion. . . No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." [*Bridges*, pp. 268-269]

This Court has reiterated these concerns in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991).

Oklahoma's decision to sanction petitioner below creates important and dangerous precedent in which the First Amendment has been held to not even be *relevant* to the speech of citizens concerning vital issues of public concern, particularly if the speaker is of a particular occupation. The message seems clear that no lawyer, even when acting wholly as a private citizen, may engage in pure petitioning activity or political speech without fear of losing his or her livelihood.

Despite this Court's clear refusal to allow a State "under the guise of prohibiting professional misconduct, [to] ignore constitutional rights" [*NAACP v. Button*, 371 U.S. 415, 439 (1963)], the Oklahoma court required no showing of a legitimate need, much less a compelling state interest in protecting the public civil bench trial process that would justify its sanctioning and chilling of pure speech unmixed with conduct.[16]

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[16] In *Cox v. Lousiana*, 379 U.S. 559 (1965) this Court recognized that a State has a legitimate interest in protecting the integrity of an ongoing criminal jury trial and could constitutionally *regulate* picketing outside the courthouse where such speech, though constituting in part, core

B. This Court's Setting of Clear and Uniform Constitutional Standards is a National Priority so that Speech on Matters of Public Concern Cannot Be Sanctioned under State Regulations that are Vague and Overbroad

The decision hereinbelow, although based on speech addressed to a smaller audience, in the context of a civil bench trial and not a criminal jury trial, is in conflict with this Court's decision in *Gentile v. State Board of Nevada*, 501 U.S. 1030 (1991) in that neither the Nevada nor the Oklahoma disciplinary rule had a settled usage or tradition of interpretation in the State sufficient to place either attorney on notice of that which the Rule prohibited. Both attorneys had reason to believe that their speech was protected under their respective State's Safe Harbor provisions. [App. F, p 9f] This Court held that such a good faith belief misled attorney Gentile into thinking that he could speak publicly without fear of discipline, [*Gentile*, p. 1048] and that the rule under which Gentile was sanctioned, although far narrower and more specific than 8.4(d), was too vague, when considered as a whole with the Safe Harbor provisions of the rule, to provide fair notice to those to whom the rule was directed. [*Gentile*, p. 1048] Petitioner Hine was similarly misled by the provisions of Oklahoma's R.P.C. 3.6(d)(6) to believe that, given the expressly granted right to use the media to warn the public of the behavior of the Child Welfare investigator and the Youth Services visitation supervisor, that 3.6(d)(6) fairly included the right to alert the trial judge to the same potential for public harm.[17] The record further demonstrated petitioner's reasonable reliance on an array of legal

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petitioning expression, was also *mixed with conduct. Although the State's regulation in Cox was far more specific than is 8.4(d), this Court held that governmental conduct gave ambiguous messages to Cox about the lawfulness of his picketing under the statute, and the State could not therefore sanction him when he had no clear advance notice of what specifically was being prohibited.*

[17] At least one court has expressly determined that speech about matters of public concern need not be aired publicly in order to be protected by the First Amendment. *Peterson v. Atlanta Hous. Auth.*, 998 F.2d 904 (11th Cir. 1993)

authorities seemingly authorizing or even immunizing her conduct.[18] Oklahoma's R.P.C. #8.4(d), as applied hereinbelow, creates an even greater trap for the wary as well as the unwary than that which existed in Gentile.

This Court's reasoning in *Gentile,* while it explained that a state disciplinary rule restricting the attorney speech of a criminal defense attorney was not overly broad if it required the State to show that the speech created a substantial likelihood of material prejudice, suggested that the failure to require the narrower, clear and present danger standard was based on attorney Gentile's having been an active participant in the trial.[19] The fact that the underlying proceeding in *Gentile* was criminal and the fact finder, lay, surely made a huge difference as well.

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[18] Petitioner's Response [App. B] cited Oklahoma's RPC #6.4 permitting a lawyer to be a member of an organization devoted to law reform activities even if the interests of a client are affected, EC 9-1 encouraging the giving of assistance to judges, and general principles of petitioning a Court as an *amicus curiae*.[App D] *See also* discussion of Oklahoma's Rule 8.2 at Note 11 *supra*. Petitioner also testisfied to the Trial Panel [App E, p. 16e] concerning her obligations to report child abuse, which some of the agency conduct was described as being.[App E, pp. 12e-14e]. 42 U.S.C. Sec. 5106a(b)(A)(iv) or its antecedent required Oklahoma to provide "for immunity from prosecution under State and local laws and regulations for individuals making good faith reports of suspected or known instances of child abuse or neglect". 10 Ok. St. Sec. 7105 also appears to extend immunity for child abuse reporters,[every Oklahoman being considered a mandated reporter] to actions taken "with respect to participation in any judicial proceeding resulting from such report."

[19] Justice Kennedy's opinion in *Gentile* [p. 1057] noted "the proposition that an attorney's speech about pending cases may present dangers that could not arise from statements by a *nonparticipant*" but acknowledged that attorney speech simply because of "its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed" does not give rise to "the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent." [p. 1057].

Another concern expressed in *Gentile*, particularly in light of the vagueness problems of the regulation under which the attorney was disciplined, was the serious potential for discriminatory enforcement where the offending speech

> "is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility". [*Gentile*, at p. 1051]

This Court expressed similar concerns in *Wayte v. United States*, 470 U.S. 598 (1985) in which prosecutorial "selectivity" was disapproved if "deliberately based upon an unjustifiable standard such as . . . the exercise of protected statutory and constitutional rights." [*Wayyte*, Hdnt. 3] The potential for such discrimination is a factor whether the sanctioning governmental action or rule is overly vague or overly broad [*NAACP v. Button*, 371 U.S. 415 (1963)(Hdnt 13)]. In either event, the unpopularity of the expressed beliefs, while having no theoretical effect on the First Amendment protections available [*Button*, Hdnt. 21], makes both discriminatory enforcement and the chilling of protected speech, potentially grim realities.[20]

This Court has noted that there are few issues

> "of government of higher concern and importance to the people than the manner in which criminal trials are conducted." [*Richmond Newspapers, Inc.*

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[20] The testimony of child advocate Diana Carroll was unrefuted that fear of bar discipline chilled numerous attorneys' participation in child advocacy organizations and that those speaking out on behalf of children's interests "come under fire very frequently. . . . they get their hands slapped, forewarned. It's just not worth it."[App. E, p. 11e]

v. Virginia, 448 U.S. 555, 575 (1980)

When the U.S. Advisory Board on Child Abuse and Neglect referred to child abuse as a "national emergency"[21], it echoed the feelings of many American citizens that there is nothing of higher priority than the family and the manner in which the child protection system addresses, or fails to address, the interests of abused children.

Americans are increasingly demanding legal insights to explain the increasing violence of their world. To meet that demand, there has emerged an unprecedented media outpouring of commentary by well known legal scholars and practicing attorneys. Such attorney speakers may now well question the potential for governmental retaliation under broad and general disciplinary regulations such as Oklahoma's 8.4(d). One would hope that it will not now be left solely to lay people to comment on the high profile child abuse and domestic violence cases, for fear that the sitting judge might have tuned in and thereby become prejudiced. Certainly it was not exclusively to non-lawyer citizens that First Amendment draftsman James Madison addressed the following comments:

> "[t]he people may therefore publicly address their representatives, *may privately advise them,* or declare their sentiment by petition to the whole body; in all these ways they may communicate their will." [Emphasis supplied] [1 Annals of Cong. 738 (1789)]

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[21] CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY VII (Aug. 1990)(U.S. Government Printing Office, Superintendent of Documents, Washington, D.C. 20401 No: 0117-092-00104-5) This Board was established under the provisions of the 1988 Amendments to the Child Abuse Prevention and Treatment Act.

and that the First Amendment required that there be no

> "retreating toward the exploded doctrine that the administrators of the Government are the masters and not the servants of the people." Address of the General Assembly to the People of the Commonwealth of Virginia, Jan. 23, 1799, 6 Madison's Writings 338 (Hunt ed. 1910), and 4 Elliott's Debates on the Federal Constitution 596 ff. (1876)

Clearly if attorney disciplinary proceedings can evade so much as a mention that federal constitutional principles even exist, the wary as well as the unwary will understand that discipline under such rules can be applied to any lawyer, under any circumstances.

IV. CONCLUSION

The state and federal courts of this nation are operating under different assumptions about the standards to apply to lawyer speech. Yet most of those assumptions and standards are ascribed to this Court. The resulting confusion about lawyer and lay speech is tantamount to the chilling of protected speech. It is a matter of compelling public urgency that this Court set specific federal constitutional standards for state restrictions of speech during the pendency of civil bench trials.

Respectfully Submitted,

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